

WO

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,) No. CV-08-01829-PHX-FJM

Plaintiff,) ORDER

VS.

75.746 Acres of Land, more or less, situate)
in Maricopa County, State of Arizona, et)
al.,)

Defendants.

The court has before it the United States' motion for partial summary judgment (doc. 51), defendants Ashby Investment Company and Ashby Land, LLC's response (doc. 54), and the government's reply (doc. 55).

I.

21 On October 6, 2008, the government filed a declaration of taking concerning a portion
22 of defendants' farmland near Luke Air Force Base in Maricopa County, Arizona. The estate
23 to be taken is an easement over about 76 acres of defendants' 211-acre property. The
24 easement permits the government to do certain things designed to facilitate the operation of
25 Luke Air Force Base, and it restricts defendants' use of the property. Land in the vicinity of
26 the base is also subject to a number of complex regulations apart from the easement. Since
27 about 1982, the property has been leased to Bickman Farms, which grows rose bushes,
28 among other crops, and pays defendants annual rent. The lease runs through 2010.

1 As evidence of just compensation in this condemnation proceeding, defendants intend
2 to offer the expert testimony of Stephen Brophy, an appraiser who has investment and
3 agricultural experience in the area. Brophy has an interest in Santa Lucia Farms, which also
4 grows rose bushes near Luke Air Force Base. In his appraisal, he evaluated the diminution
5 of value of the entire 211-acre property in order to determine the effect of the easement. Due
6 to prior restrictions affecting the approximately 76 acres subject to the easement, Brophy
7 concluded that the subject property's pre-condemnation highest and best use was agricultural.
8 He valued it using an income-based approach. He also concluded that the highest and best
9 use for the less-restricted portion of defendants' property was, and still is, industrial. Brophy
10 valued this land using a sales comparison approach.

11 The parties offer excerpts from a standard industry text on appraising, which, although
12 helpful, largely confirm the importance of hearing expert testimony at trial in this case.
13 According to our understanding, the income-based approach in question incorporates the
14 annual net operating income from an income-producing property and a capitalization rate,
15 which is an expression of a potential buyer's expectations considering associated risks and
16 market conditions. The approach is designed to determine what a buyer would pay at the
17 present time for the anticipated future benefits of owning a property.

18 In contrast, the sales comparison approach determines what a buyer would pay at the
19 present time based on what other buyers have paid for similar properties in the past,
20 presumably in anticipation of future benefits to the extent that the properties were income-
21 producing. Thus, one can extrapolate an appropriate capitalization rate in a given market
22 from the net operating income and sale prices of comparable properties. On the other hand,
23 if there are few comparable sales, the income-based approach provides an alternative
24 valuation method where net operating income and a capitalization rate can be estimated.

25 When applying the income-based approach, Brophy used cost and revenue
26 information from rose bush farming at Santa Lucia Farms instead of Bickman Farms, which
27 operates on the subject property. He also estimated a capitalization rate based on his market
28 experience instead of deriving one from comparable sales. The parties dispute whether the

1 sales Brophy used to value the less-restricted portion of defendants' property could serve as
2 comparable sales for valuing agricultural property. Brophy concluded that the only relevant
3 sales of agricultural property in the area were completed in contemplation of future industrial
4 development, and thus were not useful to value property restricted to agricultural uses.

5 In advance of a bench trial set to determine defendants' just compensation pursuant
6 to Rule 71.1(h), Fed. R. Civ. P., the government moves for partial summary judgment with
7 respect to defendants' proposed use of the income-based approach.

8 **II.**

9 The Fifth Amendment to the United States Constitution prohibits the taking of private
10 property without just compensation. Just compensation is usually expressed as the market
11 value of a property at the time of a taking, that is, "what a willing buyer would pay in cash
12 to a willing seller," United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280 (1943), in
13 consideration of the "highest and most profitable use" of the property. Olson v. United
14 States, 292 U.S. 246, 255, 54 S. Ct. 704, 708 (1934). The owner has the burden of
15 establishing the market value of the condemned property with competent evidence. See
16 United States v. 174.12 Acres of Land, 671 F.2d 313, 314 (9th Cir. 1982). Competent
17 evidence includes expert testimony that would assist the trier of fact, if it is both based on
18 sufficient facts or data and the product of reliable principles and methods applied reliably.
19 Rule 702, Fed. R. Evid.; see Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589-90, 113
20 S. Ct. 2786, 2795 (1993). In effect, the government moves to exclude Brophy's testimony
21 because it would not assist the trier of fact and it is the result of an unreliable application of
22 the income-based approach without sufficient information.

23 The government contends that defendants impermissibly seek future lost profits as
24 consequential damages through the income-based approach. Just compensation does not
25 encompass consequential damages, such as future lost profits. See Omnia Commercial Co.
26 v. United States, 261 U.S. 502, 509, 43 S. Ct. 437, 438 (1923). In response, defendants
27 maintain that they are not requesting consequential damages. We agree. The government
28 is apparently concerned that the income-based approach is tantamount to a determination of

1 future lost profits because it derives the present value of a property from the anticipation of
2 future benefits. However, the approach uses the perspective of a potential buyer in the
3 market, not expectations specific to the property owner. Therefore, it is not a measurement
4 of the owner's future lost profits. Despite its reservations, the government does not dispute
5 that the income-based approach is an approved appraisal method in the Ninth Circuit. See
6 United States v. 99.66 Acres of Land, 970 F.2d 651, 655 (9th Cir. 1992). We reject the
7 government's general concerns with the approach itself.

8 Next, the government argues that Brophy's application of the income-based approach
9 is unreliable because he uses estimated income from farming operations on the subject
10 property instead of defendants' income from leasing the property. There are several reasons
11 why the lease could be significant. If the property were encumbered by a non-market-rate
12 or long-term lease, it might affect what a potential buyer would be willing to pay for the
13 property. But the parties apparently agree that the Bickman Farms lease was near the market
14 rate, and it extended for only several years beyond the date of the taking. In any case, the
15 government does not contend that the lease affected the property's market value.

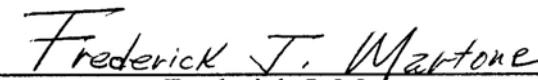
16 It is also possible that applying the income-based approach to defendants'
17 longstanding income from lease payments would render a more accurate market value than
18 applying it to estimated income from farming operations. But the government does not
19 contend that this analysis would yield a different market value, nor does it suggest that
20 agricultural appraisers favor leasing income over farming income when applying the income-
21 based approach. Rather, the government reasons that, because defendants earn income from
22 leasing and not from farming, "the application of the income approach in this instance does
23 not reflect the market value of the property to the owner." Motion for Partial Summary
24 Judgment at 2-3. As mentioned above, however, the income-based approach determines a
25 property's market value from the perspective of a potential buyer, as it must. The value of
26 the property cannot be specific to its owner and still be a market value. We reject the
27 government's contention that Brophy unreliably applied the income-based approach by
28 failing to incorporate defendants' lease payments.

1 The government also challenges Brophy's decision to use financial information from
2 Santa Lucia Farms instead of Bickman Farms. We share the government's skepticism of an
3 income-based valuation of a property that does not include an evaluation of the property's
4 actual production of income. Defendants contend that Brophy's use of information from
5 Santa Lucia Farms as a proxy was appropriate in this case because the farm grows rose
6 bushes in the same area as the subject property and Brophy had personal knowledge of its
7 costs and revenue over a three-year period. While Brophy's lack of knowledge of the subject
8 property's income production is problematic, we conclude that, under the circumstances, it
9 goes to the weight of his testimony and does not render it inadmissible for lack of sufficient
10 information.

11 Finally, the government challenges Brophy's use of an estimated capitalization rate.
12 Defendants maintain that Brophy's substantial investment and farming experience in Arizona
13 qualify him to estimate a reasonable capitalization rate for agricultural property in the area
14 of Luke Air Force Base. Given the apparent lack of comparable sales of property restricted
15 to agricultural uses from which a capitalization rate could have been derived, Brophy's
16 estimation of a capitalization rate from market experience does not render his testimony
17 unreliable.

18 Accordingly, **IT IS ORDERED DENYING** the United States' motion for partial
19 summary judgment (doc. 51).

20 DATED this 7th day of April, 2010.

21
22
23 
24 Frederick J. Martone
25 United States District Judge
26
27
28